IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2374 OF 2007
IN
S.C. SUIT NO.5241 OF 2006

Gordhanbhai Jivrajbhai Makadia .. Appellant
v/s.
Manoj Jivrajbhai Makadia .. Respondent

Mr. K.H. Holambe-Patil for the appellant.
Mr. Mohan B. Jadhav for the respondent.

CORAM : ABHAY S. OKA, J.
DATED : 29TH NOVEMBER, 2007

P.C.

Admit.

2. Advocate for the respondent-plaintiff waives service. Forthwith taken up for final disposal considering the peculiar facts of the case.

3. The appeal is by the original defendant taking an exception to the judgment and decree dated 23rd April, 2007. The suit filed by the respondent has been decreed. Considering the challenge in this appeal, it is not necessary to refer to the

merits of the case made out by both the parties in the suit.

4. The learned advocate for the appellant pointed out that by consent of the parties, the suit was referred to Lok Adalat. He submitted that in the meanwhile, written statement was filed by the appellant and notice of motion for interim relief taken out by the respondent was disposed of by passing workable order with the consent of the parties. It is contended that on 14th March, 2007, the matter was kept for settlement. The submission of the learned advocate for the appellant is that though the advocate representing for the appellant was not present on 23rd November, 2007, the trial Judge proceeded to decide the suit finally by recording in the judgment that both the advocates did not desire to lead any evidence. He submitted that issues were not framed by the trial court. He submitted that the entire procedure followed by the trial court is illegal and invalid and on that ground, the judgment is illegal.

5. The learned advocate for the respondent pointed out that the learned trial Judge has framed an issue which is referred to in paragraph 11 of the judgment. It is submitted that as the appellant-defendant was not desirous of leading evidence, the trial court proceeded to decide the suit on merits

considering the only issue involved in the suit. He, therefore, submitted that there is no illegality committed by the trial court.

6. I have carefully considered the submissions. A xerox copy of the certified copy of the Roznama of the proceedings has been placed on record. The first entry in the Roznama records what transpired before the Lok Adalat. On 22nd February, 2007, the suit appeared on board and vakalatnama of the advocate for the appellant was taken on record. Roznama dated 22nd February, 2007 records that written statement of the appellant was taken on record. On 11th April, 2007, it appears that in the afternoon session, both the advocates were heard and the suit and motion was ordered to be kept on 17th April, 2007 for orders. On 23rd April, 2007, the Roznama noted that the Advocate for the Appellant-defendant was not present and on that day impugned Judgment and order was pronounced.

7. In the impugned judgment and order, the learned Judge has referred to the order dated 22nd February, 2007, passed in the notice of motion. The said order reads thus-

"Order: "Both the advocates fairly states before the

court that, both are in joint possession of the suit premises and they will not obstruct each other, in using the suit premises and they will not forcibly dispossess each other, until further orders.

In the meantime, both the parties are directed not to operate current account No.415 maintained with Canara Bank, Kandivali (W) till next date."

7. Though concession of both the advocates was recorded that both the parties are in joint possession, the suit has been decreed by the impugned judgment and order in terms of prayer clause (a) which proceeds on footing that the respondent-plaintiff is in possession. In paragraph 11, the learned Judge has observed that the only issue which needs consideration is whether the respondent-plaintiff is entitled for order of injunction? It is, thus, obvious that the issues were not settled till 23rd November, 2007. Therefore, there was no occasion for the learned trial Judge to hear the suit finally. There are stages contemplated by the Code of Civil Procedure, 1908 after the issues are framed before the suit is set down for hearing.

8. In paragraph 12, the learned trial Judge records that

both the advocates do not desire to lead any evidence. As pointed out earlier, Roznama dated 23rd November, 2007 records that the advocate representing the appellant was absent on that date. The Roznama does not record that on any earlier date the suit was fixed either for framing issues or for recording of evidence. It is not recorded in the Roznama on any date prior to 23rd November 2007 that the advocates stated that parties do not desire to lead evidence. Thus, it is apparent that the suit has been finally decided without framing the issues and without permitting the parties to lead evidence. The procedure followed by the learned trial Judge is not contemplated by the provisions of the said Code. Hence, the only course open is to remand the suit to the trial court. Hence, I pass the following order:-

i) The impugned judgment and decree is quashed and set aside and S.C. Suit No.5241 of 2006 is restored to the file.

ii) The parties are directed to appear before the learned trial Judge on 8th January, 2008 at 11.00 a.m.

iii) Till the final disposal of the suit, the interim order

passed by the trial court on 22nd February, 2007 will continue to operate.

iv) The learned trial Judge will proceed to decide the suit expeditiously in accordance with law.

v) All contentions of the parties on the merits of the suit are expressly kept open.

9. The appeal is partly allowed in the above terms with no order as to costs.

Parties and the trial court to act upon the authenticated copy of this order.

ABHAY S. OKA, J.